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80-1612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. HAWKINS,

Petitioner,

v.

HOLIDAY INNS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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April 22, 1981

QUESTION PRESENTED

Was the finding of the District Court that respondent Holiday Inns'* actions were not in violation of the Sherman Act, Section 1, and did not damage the petitioner erroneous?

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* The non-wholly owned subsidiaries of respondent are: ADM, Inc., Delta Hotels, Ltd., Ghenthotel, N.V., Harrah's-Holiday Inns, Inc., Holiday Inns (Andina), Inc., Continental Motor Inns (Deutschland) GmbH, DUPA Hotelbetriebs—und Beratungsgeselschraft MbH, Holiday Inn GmbH, MAH Hotelbetriebs—und Beratungsgeselschraft MbH, Holiday Inns Hoteis do Brazil Ltda., Hipocampo S.A., C.A. Holiday Inn VIHSA (HIVA), Complejo Turistico La Sapoara, C.A., La Societe Developpement et Gestion Hoteliere de Strasbourg S.a.r.l., Omega Hotels, Ltd., Show-Biz Music, Inc., Del-O-Music, Inc., Mijoy Music, Inc., and Tak How Investments Limited.

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Statute:

15 U.S.C. § 1 i

STATEMENT OF THE CASE

The underlying facts are set forth in the decision of the Court of Appeals (A1-A3).*

THE FINDINGS OF THE DISTRICT COURT

Based on the evidence at trial, and considering the evidence in the light most favorable to petitioner, the District Court made the following findings of fact and granted respondent's motion for judgment notwithstanding the verdict:

(1) As a matter of law, the evidence was insufficient to support a finding that petitioner received an offer to purchase its hotels and franchises (A17-A19);

(2) Respondent, in all likelihood, would not have approved the party with whom petitioner was negotiating as a franchisee due to its financial condition, even if the contested policy had not existed (A19);

(3) Respondent never restrained petitioner from operating or owning non-Holiday Inn hotels (A21);

(4) There is no evidence that respondent's policy not to issue franchises to owners of competing hotels damaged petitioner (A19); and

(5) In the light of all the evidence as to a broad and widespread availability of potential purchasers, reasonable minds could not conclude that respondent's policy resulted in public injury or destructive competitive practices (A21-A22).

THE HOLDING OF THE COURT OF APPEALS

On November 5, 1980, the United States Court of Appeals for the Sixth Circuit unanimously affirmed the order and judgment of the District Court (A5). The Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc on December 23, 1980 (A29).

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* References so indicated are to the opinion of the Court of Appeals (pp. A1-A5 of the Petition herein) or of the District Court (pp. A6-A24).

SUMMARY

The Court of Appeals and the District Court concluded that respondent has not violated the antitrust laws. Both decisions were based upon the factual finding that respondent acted unilaterally and without injury to petitioner or anyone else. This Court held analogous conduct to be lawful in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), and such conduct has been sanctioned by this and lower courts in numerous subsequent decisions. Petitioner's primary reliance on resale price fixing cases is misplaced and underscores the lack of merit of its Petition.

ARGUMENT

THE FINDINGS OF THE DISTRICT COURT, AFFIRMED BY THE COURT OF APPEALS, ARE CORRECT

Contrary to petitioner's assertions, this case raises no issues worthy of review by this Court.

The District Court and the Court of Appeals have reached identical conclusions on the relevant facts in this case. Specifically, they found that: (i) petitioner never received an offer from Radice Realty to purchase petitioner's Holiday Inn hotels and franchises; (ii) respondent's policy of not issuing franchises to owners of competing hotels was never enforced against petitioner; (iii) petitioner, who continues to own and operate three Holiday Inn hotels, has not suffered any damages because of respondent's policy; and (iv) respondent did not refuse to deal with petitioner or anyone else (A4).

On these findings of fact, both courts correctly applied the law and held that respondent has not violated the antitrust laws. In *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), this Court held that:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own inde-

> pendent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

250 U.S. at 307. *See also United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *rev'd in part, Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The facts unequivocally show that respondent, by stating its policy not to issue franchises to competitors, acted unilaterally and within the boundaries of *Colgate* (A4). Thus, the Court of Appeals correctly relied on *Colgate* and its prior decision in *Byars* v. *Bluff City News Company, Inc.*, 609 F.2d 843 (6th Cir. 1979), in which it concluded that in the absence of proof that the defendant possessed monopoly power, the defendant lawfully could choose not to deal with the plaintiff.

Further, the District Court, examining the reasonableness of respondent's policy, held that:

> . . . reasonable minds could not conclude that the [respondent's] practice with regard to the "non-Holiday Inn clause" resulted in public injury or destructive competitive practices. Even [petitioner's] counsel concedes [respondent] has a valid and strong interest in its service mark; it may refuse to license or franchise its use unless "conceived to achieve forbidden ends" or "accompanied by unlawful conduct or agreement" or "conceived in monopolistic purpose or market control" [citations omitted] (A22).

The Court of Appeals, by affirming the District Court's holding, adopted this analysis, despite petitioner's claim to the contrary (A8).

Because this case presents a legal issue that was answered by this Court over 60 years ago and on similar facts continues to be answered the same way today, the understanding of the law will not be enhanced by this Court's review.

THE HOLDINGS OF THE COURT OF APPEALS AND THE DISTRICT COURT DO NOT CONFLICT WITH THIS COURT'S OR LOWER COURTS' DECISIONS

The holding in this case is consistent with the decisions of this Court interpreting and delimiting the *Colgate* doctrine.

Since 1919, this Court and other courts have repeatedly held that where a manufacturer, trader or franchisor acts unilaterally in deciding with whom it will do business, the conduct is lawful under the *Colgate* holding. *See, e.g., Schwinn, supra, Byars, supra, Aladdin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979); *Shawver & Son, Inc.* v. *Oklahoma Gas & Electric Co.*, 463 F.2d 204 (10th Cir. 1972); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972); *Ricchetti* v. *Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Business Equipment Center, Ltd.* v. *Dejur-Amsco Corp.*, 465 F. Supp. 775 (D.D.C. 1978); *Wales Home Remodeling Co., Inc.* v. *Alside Aluminum Corp.*, 443 F. Supp. 908 (E.D. Wis. 1978).

Respondent agrees with petitioner that this Court's holding in *Colgate* does not give a franchisor such as respondent unbridled discretion in conducting its business. Each limitation on *Colgate* cited by petitioner, however, is based upon factual distinctions that are not present in this case. *

Where the facts show more than unilateral acts and support a finding of anti-competitive conduct, the courts consistently and correctly apply the law as derived from *Colgate.* For example, the presence of one or more of the following facts removes a case from the protection of *Colgate:* unlawful resale price maintenance or enforcement policies, *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); tying arrangements, *Osborn* v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963); concerted refusals to deal, *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922): or territorial restrictions, *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 932 (1971). This case, however, does not involve any of these factors. The holding in this case falls into the predictable pattern and is the result of a correct application of the law.

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* Virtually all cases relied upon by petitioner involve price fixing and are inapposite to a correct decision in this case. *See, e.g., Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co. of Cal.*, 377 U.S. 13 (1964); *United States* v. *Parke Davis Co.*, 362 U.S. 29 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Frey & Sons, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208 (1921); *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85 (1920).

It is clear that lower courts do not need additional guidance from this Court on the law to be applied in refusal to deal cases. Perhaps more such cases decided after *Colgate* have fallen outside *Colgate* than have fallen within it, but this does not mean, as petitioner implies, that *a fortiori* this case must do the same. Two courts have concluded that respondent has not violated the antitrust laws. The factual evidence fully supports their conclusion.

This case does not fit into that category of cases that, because of their profound legal and social significance, are worthy of this Court's review.

CONCLUSION

For the reasons stated herein, the Petition for a writ of certiorari should be denied.

Dated: April 22, 1981
New York, New York

Respectfully submitted,

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